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Dato' Hj Muhammad bin Hamzah v RHB Bank Bhd (having power over Bank Utama (M) Bhd)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-173–01 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
7 SEPTEMBER 2018

C

Limitation — Charge — Enforcement of charged land — Plaintiff filed originating summons and obtained order for sale in May 2002 having served Form 16D on defendant in September 1999 — Defendant sought order that plaintiff be restrained from taking any action to auction property — Whether
D *plaintiff barred from proceeding with auction — Limitation Act 1953 s 21(1)*

This appeal filed by the Dato' Hj Muhammad bin Hamzah ('the defendant') emanated from the decision of the learned High Court judge at Shah Alam. The learned judge affirmed the decision of the learned registrar in dismissing
E the defendant's application to restrain RHB Bank Bhd ('the plaintiff') from proceeding with any action to enforce the charge or to recover the proceeds of sale of the property known as HS (D) 11668, PT No 5301, Mukim Ampang, Selangor ('the property'). The defendant was the registered owner of the property. In 1997, the defendant was granted a housing loan facility for
F RM200,000 and an overdraft facility for the same amount by Bank Utama (M) Bhd ('Bank Utama'). The security for the loan was, inter alia, a charge on the property in favour of Bank Utama. The defendant defaulted on the loan and Bank Utama issued a statutory demand vide Form 16D dated 6 September 1999 on the defendant. This was followed by the filing of an originating
G summons by Bank Utama in December 1999 seeking for an order for sale of the property. The originating summons filed by Bank Utama was withdrawn. The plaintiff who had taken over the business of Bank Utama filed a fresh originating summons in 2001 and obtained an order for sale of the property on 6 May 2002. The property had yet to be sold and remained in the possession of
H the defendant. In April 2017, the defendant filed a notice of application seeking for an order that the plaintiff be restrained from taking any action to recover the sums due or to enforce the charge or to recover the proceeds of sale of the property. The application was premised on s 21(1) of the Limitation Act 1953 ('the Limitation Act'). The defendant's contention that the plaintiff's
I action to auction the defendant's property was barred by limitation, as more than 12 years had passed since Form 16D was issued or since the order for sale was made. The application was dismissed by the learned registrar. On appeal to the judge in chambers, the defendant's appeal was dismissed. The learned judge found that the plaintiff's application made on 18 May 2017 was merely for a

new date for a public auction and that s 21(2) of the Limitation Act relied upon by the defendant was not applicable. Hence, this appeal. The issue for consideration was whether the plaintiff was barred from proceeding with the auction under s 21(1) of the Limitation Act.

Held, allowing the defendant's appeal and setting aside the order of the High Court:

(1) The learned judge was mistaken as to the basis of the defendant's application. The dispute did not concern the filing of the originating summons for the order for sale or the foreclosure action as such but rather the further action taken by the plaintiff to auction the property, after a lapse of 12 years from the date the order for sale was granted (see paras 16 & 18).

(2) While fixing of a new auction date by the court may be defined to be a progression of the plaintiff's originating summons, it was nevertheless a distinct and separate action requiring the plaintiff's application to court. Section 21(1) of the Limitation Act applied to the plaintiff's action to auction the property, such action was a proceeding in a court of law within s 2 of the Limitation Act. Taking the date of the order for sale, any action by the plaintiff to auction the property would be clearly beyond the 12 year period. Such an action would, in any case, be caught by s 6(3) of the Limitation Act (see paras 25–26).

[Bahasa Malaysia summary

Rayuan ini difailkan oleh Dato' Hj Muhammad bin Hamzah ('defendan') yang timbul daripada keputusan hakim Mahkamah Tinggi yang bijaksana di Shah Alam. Hakim yang bijaksana mengesahkan keputusan pendaftar yang bijaksana dalam menolak permohonan defendan untuk menahan RHB Bank Bhd ('plaintif') daripada meneruskan apa-apa tindakan untuk menguatkuasakan gadaian atau untuk mendapatkan semula hasil jualan hartanah yang dikenali sebagai HS (D) 11668, PT No 5301, Mukim Ampang, Selangor ('hartanah'). Defendan adalah pemilik berdaftar hartanah tersebut. Pada tahun 1997, defendan telah diberikan kemudahan pinjaman perumahan sebanyak RM200,000 dan kemudahan overdraf bagi jumlah yang sama oleh Bank Utama (M) Bhd ('Bank Utama'). Cagaran untuk pinjaman itu, antara lain, gadaian ke atas harta yang memihak kepada Bank Utama. Defendan telah memungkiri pinjaman dan Bank Utama mengeluarkan tuntutan statutori melalui Borang 16D bertarikh 6 September 1999 kepada defendan. Ini diikuti dengan pemfailan saman pemula oleh Bank Utama pada Disember 1999 yang memohon perintah penjualan hartanah itu. Saman pemula yang difailkan oleh Bank Utama telah ditarik balik. Plaintif yang telah mengambil alih perniagaan Bank Utama memfailkan saman pemula yang baru pada tahun 2001 dan memperoleh satu perintah penjualan hartanah itu pada 6 Mei 2002. Hartanah itu masih belum dijual dan kekal sebagai milik defendan. Pada April 2017,

defendan memfailkan notis permohonan yang memohon satu perintah bahawa plaintif ditahan daripada mengambil apa-apa tindakan untuk mendapatkan jumlah terhutang atau untuk menguatkuasakan gadaian atau untuk mendapatkan hasil jualan hartanah itu. Permohonan itu didasarkan pada s 21(1) Akta Had Masa 1953 ('Akta Had Masa'). Defendan mendakwa bahawa tindakan plaintif untuk melelong hartanah defendan telah dihalang oleh had masa, kerana lebih daripada 12 tahun telah berlalu sejak Borang 16D dikeluarkan atau sejak perintah penjualan dibuat. Permohonan itu ditolak oleh pendaftar yang bijaksana. Apabila merayu kepada hakim di kamar, rayuan defendan telah ditolak. Hakim yang bijaksana mendapati bahawa permohonan plaintif yang dibuat pada 18 Mei 2017 adalah semata-mata untuk tarikh baru bagi lelongan awam dan s 21(2) Akta Had Masa yang didasarkan oleh defendan tidak terpakai. Oleh itu, rayuan ini. Isu untuk dipertimbangkan ialah sama ada plaintif dihalang daripada meneruskan lelongan di bawah s 21(1) Akta Had Masa.

Diputuskan, membenarkan rayuan defendan dan mengetepikan perintah Mahkamah Tinggi:

(1) Hakim yang bijaksana terkhilaf mengenai asas permohonan defendan. Pertikaian itu tidak membabitkan pemfailan saman pemula untuk perintah penjualan atau tindakan perampasan sedemikian tetapi sebaliknya tindakan selanjutnya yang diambil oleh plaintif untuk lelongan hartanah itu, setelah luput 12 tahun dari tarikh perintah penjualan itu diberikan (lihat perenggan 16 & 18).

(2) Semasa penetapan tarikh lelongan baru oleh mahkamah boleh ditakrifkan sebagai suatu perkembangan saman pemula daripada plaintif, namun ia merupakan tindakan yang berbeza dan berasingan yang menghendaki permohonan plaintif ke mahkamah. Seksyen 21(1) Akta Had Masa terpakai kepada tindakan plaintif untuk melelong hartanah itu, tindakan itu adalah prosiding dalam mahkamah undang-undang di dalam s 2 Akta Had Masa. Mengambil tarikh perintah penjualan, apa-apa tindakan oleh plaintif untuk lelongan hartanah itu jelas sekali melebihi tempoh 12 tahun. Tindakan sedemikian akan, dalam mana-mana, dihalang oleh s 6(3) Akta Had Masa (lihat perenggan 25–26).]

Notes

For cases on charge in general, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2430–2444.

Cases referred to

Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad [2011] 1 MLJ 145, FC (folld)

Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and

another appeal [2013] 3 MLJ 61, CA (refd)
Peh Lai Huat v MBf Finance Bhd [2011] 3 MLJ 470, HC (refd)
Sivadevi a/p Sivalingam v CIMB Bank Bhd [2018] 5 MLJ 82, CA (refd)

Legislation referred to

Limitation Act 1953 ss 2, 2(1), 6(3), 21(1), (2)
National Land Code ss 256, 257, Form 16D
National Language Act 1963/67 s 8

Appeal from: Originating Summons No MT5–24–3163 of 2001 (High Court, Shah Alam)

HC Tan (HC Tan & Zahani) for the appellant.
Jasvinder Singh (Mazwan Pathma & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal filed by Dato' Hj Muhammad bin Hamzah ('the defendant') emanates from the decision of the learned High Court judge at Shah Alam.

[2] The learned judge affirmed the decision of the learned registrar in dismissing the defendant's application to restrain RHB Bank Bhd ('the plaintiff') from proceeding with any action to enforce the charge or to recover the proceeds of sale of the property known as HS(D) 11668, PT No 5301, Mukim Ampang, Selangor ('the property').

[3] We had allowed the defendant's appeal and we now state our reasons.

THE BACKGROUND FACTS

[4] The defendant is the registered owner of the property. In 1997, the defendant was granted a housing loan facility for RM200,000 and an overdraft facility for the same amount by Bank Utama (M) Bhd ('Bank Utama').

[5] The security for the loan, was, inter alia, a charge on the property which was registered on 24 December 1997 in favour of Bank Utama.

[6] The defendant defaulted on the loan. Bank Utama issued a statutory demand vide Form 16D dated 6 September 1999 on the defendant. This was followed by the filing of an originating summons by Bank Utama in December 1999 seeking for an order for sale of the said property, under ss 256 and 257 of the National Land Code.

A **[7]** The originating summons filed by Bank Utama was withdrawn. The plaintiff who had taken over the business of Bank Utama filed a fresh originating summons in 2001 and obtained an order for sale of the property on 6 May 2002.

B **[8]** Directions for the sale of the property were issued under application for Execution No AE 38–36–2004. Notwithstanding the order for sale and the directions for public auction, the property has yet to be sold and remains in the possession of the defendant.

C **[9]** On 14 August 2000, the defendant was adjudged a bankrupt after a receiving order and an adjudication order was made against him.

[10] In April 2017, having obtained the sanction from the Director General of the Insolvency Department, the defendant filed a notice of application seeking for an order that the plaintiff be restrained from taking any action to recover the sums due or to enforce the charge or to recover the proceeds of sale of the property.

E **[11]** The application was premised on s 21(1) of the Limitation Act 1953 ('the Limitation Act'). It was the defendant's contention that the plaintiff's action to auction the defendant's property was barred by limitation, as more than 12 years had passed since Form 16D was issued or since the order for sale was made.

F **[12]** The application was dismissed by the learned registrar. On appeal to the judge in chambers, the defendant's appeal was dismissed. The learned judge agreed with the learned registrar that the plaintiff's originating summons for an order for sale was not barred by limitation and that there was no cause to the G contrary shown. The learned judge found that the plaintiff's application made on 18 May 2017 was merely for a new date for a public auction and that s 21(2) of the Limitation Act relied upon by the defendant was not applicable.

THE APPEAL

H **[13]** The argument of learned counsel for the defendant was simply this: taking the date of Form 16D on 6 September 1999 or the date of the order for sale on 6 May 2002, the plaintiff's action to auction the property is barred by s 21(1) of the Limitation Act.

I **[14]** In opposing the appeal, learned counsel for the plaintiff argued that the plaintiff's action was filed within the time stipulated according to the Limitation Act. Reliance was placed on two decisions of this court in *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470 and *Jigarlal K Doshi @ Jigarlal a/l*

Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal [2013] 3 MLJ 61 for the proposition that a chargee bank's cause of action accrues upon the expiry of the statutory notice period in Form 16D sent to the chargor. Learned counsel for the plaintiff also highlighted the recent decision in *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82 where this court declined to follow the decisions in *Peh Lai Huat* and *Jigarlal K Doshi*.

OUR DECISION

[15] The learned judge dismissed the defendant's appeal on, inter alia, the ground that the defendant's application was based on s 21(2) of the Limitation Act and that the said section was not applicable.

[16] With respect, we found that the learned judge was mistaken as to the basis of the defendant's application. As a matter of fact, the application was not based on s 21(2) but on s 21(1) of the Limitation Act (see the written submission of the defendant in the High Court at pp 100–107 of the record of appeal).

[17] Section 21(2) of the Limitation Act adverted to by the learned judge reads:

> (2) No foreclosure action in respect of mortgaged personal property shall be brought after expiration of twelve years from the date on which the right to foreclose accrued:
>
> Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

[18] In any event, the dispute before us did not concern the filing of the originating summons for the order for sale or the foreclosure action as such but rather the further action taken by the plaintiff to auction the property, after a lapse of twelve years from the date the order for sale was granted.

[19] To recap, the plaintiff filed the originating summons and obtained an order for sale in May 2002 having served Form 16D on the defendant in September 1999. There is no dispute that the plaintiff's originating summons seeking for an order for sale was filed within the twelve year period. The defendant had no complaint on the filing of the originating summons. The defendant's complaint was in respect of the plaintiff's action to auction the property. Hence in this regard, the cases relied upon by the plaintiff are not relevant as those cases dealt with the filing of the foreclosure proceedings whereas that was not the issue before us.

[20] The issue before us was whether the plaintiff is barred from proceeding with the auction under s 21(1) of the Limitation Act.

[21] Section 21(1) of the Limitation Act upon which the defendant's application was anchored provides:

> No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[22] We found the answer to this issue in s 2(1) of the Limitation Act which defines action as follows:

> 'action' includes a suit or any proceeding in a court of law:

[23] In *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad* [2011] 1 MLJ 145, the Federal Court considered the meaning of the word 'proceedings' in s 8 of the National Language Act 1963/67 and sets out *P Ramanatha Aiyar's Advanced Law Lexicon* at p 3745 relied upon by the appellant:

> [11] ...
>
> 'Proceedings' is a word much used to express the business done in Courts. A proceeding in Court is an act by the authority or direction of the Court, express or implied. It is more comprehensive than the word 'action', but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include — (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the remitter, or sending back of the record to the lower Court from the appellate or reviewing Court; (13) the enforcement of the judgment, or a new trial, as may be directed by the Court of last resort. EDWIN E. BRYANT, The Law of Pleading Under the Codes of Civil Procedure 3–4 (2nd Ed 1899).

[24] The Federal Court further states:

> [12] *Black's Law Dictionary* (7th Ed) at p 1221 defines the word 'proceeding' in the following term:
>
> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.

(see also *Stroud's Judicial Dictionary of Words and Phrases*, (7th Ed) Vol 3 at p 1426.

[13] Section 3 of the Courts of Judicature Act 1964 ('the CJA') defines 'proceeding' as follows:

'Proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of the proceeding.

[14] From the above definitions, we may conclude that 'proceeding' includes amongst others the institution or commencement of action, judgment, execution and the taking of an appeal or writ of error. ...

[25] Guided by the above authority, while fixing of a new auction date by the court may be defined to be a progression of the plaintiff's originating summons, it is nevertheless a distinct and separate action requiring the respondent's application to court. This is evident by the entry of a separate code, in this case 'Execution No: 38–36–2004' although the order for sale was granted in 2002. It clearly falls under 'any proceeding in a court of law'.

[26] Given the clear definition of the word 'action' which includes 'proceeding', we agreed with the defendant that s 21(1) of the Limitation Act applies to the plaintiff's action to auction the property, such action is a proceeding in a court of law within s 2 of the Limitation Act. Taking the date of the order for sale, any action by the plaintiff to auction the property would be clearly beyond the twelve year period. Such an action would, in any case, be caught by s 6(3) of the Limitation Act.

[27] In the circumstances, we allowed the appeal with no order as to costs. The order of the High Court was set aside. We granted order in terms of the defendant's application in prayer (b) at p 13 of the record of appeal to the extent that the plaintiff is restrained from taking any action to enforce the charge.

Defendant's appeal allowed and order of the High Court set aside.

Reported by Nabilah Syahida Abdullah Salleh